
OPINION OF THE PUBLIC ACCESS COUNSELOR

DON NIEMEYER,
Complainant,

v.

ALLEN COUNTY REGIONAL WATER AND SEWER
DISTRICT,
Respondent.

Formal Complaint No.
18-FC-28

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Allen County Regional Water and Sewer District (“ACRWSD”) violated the Access to Public Records Act¹ (“APRA”). The district responded to the complaint through attorney Vince Heiny. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the

¹ Ind. Code §§ 5-14-3-1 to -10

formal complaint received by the Office of the Public Access Counselor on February 7, 2018.

BACKGROUND

On or about January 16, 2018, the Mr. Don Niemeyer (“Complainant”) submitted a public records request to the Allen County Regional Water and Sewer District (“District”) for a copy of, among other materials, a preliminary engineering report developed by an outside contractor.

The District must submit a preliminary engineering report (“PER”) to the Indiana Department of Environmental Management outlining the District’s proposed projects. The PER may contain projects that do not materialize because of costs or the adverse effect it may have on current rates and charges. The report was denied as it lacked deliberative materials which may be withheld at the discretion of the public agency. Nevertheless, an additional request was submitted on January 29, 2018.

Complainant filed a formal complaint alleging the Allen County Regional Water and Sewer District (“ACRWSO” or “District”) violated the Access to Public Records Act (“APRA”) by improperly denying his request for public records. Specifically, Niemeyer contends that the District lacks the discretion to withhold certain records under APRA’s deliberative materials exception.

For its part, the ACRWSO argues that the materials are indeed deliberative as they are speculative in nature and communicated for the purposes of decision-making. Although the ACRWSO provided this Office with the first page of two reports from Umbaugh and Associates, it did not provide

this Office with a copy of the records at issue for in-camera review.

ANALYSIS

1. The Access to Public Records Act (“APRA”)

The APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The Allen County Regional Water and Sewage District (“ACRWSD”) is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies, any person has the right to inspect and copy the ACRWSD’s public records during regular business hours. Ind. Code § 5-14-3-3(a). A request for inspection or copying must identify with reasonable particularity the record being requested. Ind. Code § 5-14-3-3(a)(1).

APRA has both mandatory and discretionary exemptions to the disclosure of public records. *See* Ind. Code §§ 5-14-3-4(a) and (b). One category of records that may be withheld from disclosure at the discretion of the agency are those records categorized as deliberative materials. *See* Ind. Code § 5-14-3-4(b)(6).

1.1 Deliberative Materials Exception

Under APRA, *deliberative material* includes records that are:

intra-agency or interagency advisory...including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and

that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, consideration, and recommendations on a subject or issue for use in a decision making process. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. 766 N.E.2d at 12.

In order to withhold a public record from disclosure under Indiana Code section 5-14-3-4(b)(6), the documents must be interagency or intra-agency records of advisory or deliberative material *and* are also expressions of opinion or speculative in nature.

The deliberative materials exemption is indeed broad and can be subject to abuse. Some have called it the exception that swallows the rule. Potential abuse notwithstanding, as the *Newman* court indicates, it has valuable and sound application and can certainly be exercised consistent with good governance and transparency principals.

In this case, based on the evidence submitted to this Office, it appears that H.J. Umbaugh and Associates—a contractor—created the records at issue for the purpose of the ACRWSD's decision-making process about proposed projects. These reports look to include projected cash flows, bond coverage and utilization of the rate stabilization fund by the district. The methodology behind the decision-mak-

ing process, including financial modeling, formulas, calculations and procedures are generally considered deliberative in nature. They are not merely assessments of current conditions but forecasts based upon the proprietary acumen of H.J. Umbaugh and Associates.

To be sure, the deliberative materials exception extends to contractors' speculation, which is essentially what forecasting is—an estimate of future conditions. The materials in the Umbaugh report are projections predicated on those speculations and presumptions; and thus, may be categorized as deliberative material in this instance

On the other hand, Mr. Niemeyer's contention that these reports are no longer deliberative in nature because the district made a decision and took action on the matter is well-taken. Indeed, it is difficult to understand how a public agency maintains discretion to withhold a record under the deliberative materials exception when there is some indication that the agency has made the decision that the report was created to assist the agency in making. Still, the deliberative materials exception does not provide a distinction between pre-decision and post-decision, so that the records may be withheld even after a decision has been made.

Notably, it is unclear from the evidence submitted to this Office whether the district has indeed made a decision and taken final action on the items addressed in the specific Umbaugh report that Niemeyer is seeking. It seems he is requesting the financial reports associated with the 2016 PER that the district approved in January.

Regardless, a public agency should be judicious in invoking the deliberative materials exception, even more so, if a final

decision has been made on the issue addressed in public record that has been withheld as deliberative.

Based on the evidence submitted, this Office cannot conclude that the ACRWSD abused its discretion in withholding the financial reports.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Allen County Regional Water and Sewer District has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the name of the Public Access Counselor.

Luke H. Britt
Public Access Counselor